

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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KEVIN FERNANDEZ,

Plaintiff,

v.

JAMES GREG COX, et al.,

Defendants.

Case No. 3:14-cv-00578-MMD-VPC

ORDER

On August 10, 2015, Magistrate Judge Cooke denied Plaintiff's motion for examination of plaintiff and prior biological specimens (dkt. no. 52). (Dkt. no. 84.) Plaintiff moves for review of the Magistrate Judge's decision pursuant to Fed. R. Civ. P. 72(a) ("Motion"). (Dkt. no. 91.) Defendants have filed a response. (Dkt. no. 101.) For reasons stated below, the Court denies the Motion.

Magistrate judges are authorized to resolve pretrial matters subject to district court review under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); see *also* Fed. R. Civ. P. 72(a); L.R. IB 3-1(a) ("A district judge may reconsider any pretrial matter referred to a magistrate judge in a civil or criminal case pursuant to LR IB 1-3, where it has been shown that the magistrate judge's ruling is clearly erroneous or contrary to law."). "This subsection would also enable the court to delegate some of the more administrative functions to a magistrate judge, such as . . . assistance in the preparation of plans to achieve prompt disposition of cases in the court." *Gomez v. United States*, 490 U.S. 858, 869 (1989). "A finding is clearly

erroneous when although there is evidence to support it, the reviewing body on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *United States v. Ressam*, 593 F.3d 1095, 1118 (9th Cir. 2010) (quotation omitted). A magistrate judge’s pretrial order issued under 28 U.S.C. § 636(b)(1)(A) is not subject to *de novo* review, and the reviewing court “may not simply substitute its judgment for that of the deciding court.” *Grimes v. City & County of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991).

Plaintiff requested, pursuant to Rule 35(a), that the Court order an independent physician to conduct physical examination of him for toxicological exposure and DNA testing of biological specimens previously obtained by Defendants. (Dkt. nos. 52.) Rule 35(a) provides, in pertinent part, that the court “may order a party whose mental or physical condition . . . is in controversy to submit to a physical or mental examination . . .” Fed. R. Civ. P. 35(a). The typical Rule 35(a) request is made by the party who seeks to have the opposing party submit to an examination for the obvious reason that a party who wishes to be examined may do so without being compelled by a court. Plaintiff’s request for the Court to order his own examination would turn Rule 35(a) on its head. To the extent Plaintiff cannot afford the expense of an examination, he cannot use Rule 35(a) to shift the cost to Defendants. *See Cottle v. Nevada Dep’t of Corr.*, No. 3:12-cv-MMD-WGC, 2013 WL 5773845, at \*2 (D. Nev. Oct. 24, 2013). The Magistrate Judge thus did not commit clear error in denying Plaintiff’s motion.

It is therefore ordered that Plaintiff’s Motion for Review of the Magistrate’s Order (84) As It Relates to Motion (52) Pursuant to FRCP 72(a) (dkt. no. 91.) is denied.

The parties submitted two stipulations for Plaintiff to respond to Defendants’ response. (Dkt. nos. 106, 113.<sup>1</sup>) LR IB 3-1(a) permits the filing of a motion for reconsideration of a magistrate judge’s pretrial orders and a response; it does not

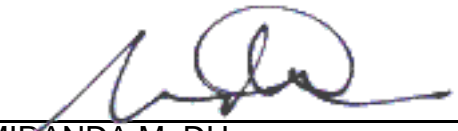
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<sup>1</sup>The two stipulations are identical except that the second stipulation (dkt. no. 113) is fully signed

1 permit the filing of a reply. The Court therefore denies the stipulations (dkt no. 106,  
2 107). The Clerk is instructed to strike Plaintiff's reply (dkt. no. 107).

3 DATED THIS 22<sup>nd</sup> day of October 2015.

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6 MIRANDA M. DU  
7 UNITED STATES DISTRICT JUDGE  
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